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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 301

EDWARD G. BUDD MANUFACTURING COMPANY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The court below issued no opinion. Its decree (R. 321) is reported in 162 F. 2d 461. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 53–58, 31–47) are reported in 65 N. L. R. B. 612.

JURISDICTION

The decree of the court below (R. 321) was entered on June 3, 1947. The petition for a writ of certiorari was filed August 27, 1947. The jurisdiction of this Court is invoked under Section

240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTION PRESENTED

The Board consents to this Court's granting of a writ of certiorari for the limited purpose of making certain modifications in the decree entered by the court below which are rendered necessary by the enactment of the Labor Management Relations Act of 1947 subsequent to the entry of the decree below. The Board consents that the portion of the decree entered by the court below requiring petitioner to cease and desist from discouraging membership in the Foreman's Association of America or from in any other manner interfering with its supervisory employees in the exercise of the right to self-organization, may and should be stricken. Subject to these modifications only one question is presented for determination:

Whether the Labor Management Relations Act of 1947 operates retroactively so as to compel the setting aside of a decree of the court below issued twenty days before that statute was enacted and eighty days before its effective date, which decree enforces a Board order, valid under the prior law, requiring petitioner to reinstate with back pay a foreman discriminatorily discharged.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act of 1935 (49 Stat. 449, 29 U. S. C.

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151 *et seq.*) and of the Labor Management Relations Act of 1947 (Public Law 101, 80th Cong., 1st Sess., Chap. 120) are set forth in the Appendix, *infra*, pp. 22–28.

STATEMENT

Upon the usual proceedings under Section 10 of the National Labor Relations Act, the Board, on January 30, 1946, issued its findings of fact, conclusions of law, and order (R. 53–56, 31–47). The facts as found by the Board and as shown by the evidence, so far as material to the issues here presented, may be summarized as follows:[1]

In the early part of 1944, as a result of organizing activities on the part of petitioner's foremen, a chapter of the Foreman's Association of America, hereinafter called the Union, was formed at petitioner's plant (R. 34; 128, 152–153). At the first meeting of the Union, held a few weeks before Easter at the home of Oscar Owens, a foreman then employed by petitioner, Owens, McNary, and Harrison were selected as temporary officers of the Union (R. 34, 38; 128). Owens was named president (R. 38; 130). Petitioner promptly learned of these activities, and the three Union officers were immediately summoned to two successive meetings with petitioner's plant manager, Walton, and its personnel director,

[1] In the following statement, record references preceding the semicolons are to the Board's findings; succeeding references are to the supporting evidence.

Erwood (R. 34–35; 73–74, 79–80, 129–130). At the first meeting Owens, McNary, and Harrison were interrogated by Walton and Erwood respecting their Union affiliation, and their reasons for wanting a union (R. 35; 79–80, 129). At the second meeting Erwood told them, "You either got to resign as officers of the Union or resign from the Company," and Walton added, "You fellows cannot belong to it [the Union] and work for Budd" (R. 35; 130, 132). They were also warned to discontinue their organizational efforts on penalty of discharge (R. 35; 95). Thereupon Owens, Harrison, and McNary promised to, and on the following Sunday did, resign as officers of the Union (R. 35; 131, 132–3).

In further implementation of petitioner's anti-union program, all petitioner's foremen were called before Walton, Erwood, and other supervisors of the company and questioned as to why they wanted a union and what grievances they had (R. 35; 81, 82, 88). There they were told unequivocally that the Company "did not want a Union and that we would oppose it" (R. 35; 82, 179). One group of foremen was told by Erwood that "Before we have a Foreman's Union, we will shut the plant down" (R. 35 n. 5; 162). Petitioner admits that it "did warn and threaten its supervisory employees that they would be discharged unless they resigned their membership in or ceased to engage in activities on behalf of the Union" (R. 35 n. 5; 24, 28).

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Oscar Owens was summarily discharged on April 14, 1944, less than two weeks after his resignation as president of the Union, the discharge to be effective in fifteen minutes (R. 38; 134). On Owens' complaint that a discharge on such short notice was unusual, Superintendent Montee replied, "Well, I know. You know what it is all about" (R. 38; 134–135). Owens then asked Personnel Director Erwood to reinstate him to his former nonsupervisory job as inspector (R. 38; 138). It was petitioner's practice to permit foremen who could no longer be used in that capacity to continue to work as rank and file employees, and jobs for which Owens was qualified were then available (R. 38; 100, 112, 309). Nevertheless, Erwood refused Owens' request admittedly because he had heard that Owens had continued his organizing activities for the Union (R. 38, 100–101).[2] A request by a group of foremen for Owens' reinstatement was met with the response that Owens had been discharged "because he was a god-damned liar" (R. 39; 176, 179, 181). Petitioner admits that it "laid him [Owens] off and that it refuses to reemploy him" because "he attempted to organize members of the Company's supervision into a labor organization and * * * when warned that continuation of such action would result in his being laid

[2] In fact, Owens was the only supervisory employee who was laid off during the first four months of 1944 without being given the opportunity of going back to work on production (R. 112).

off, he agreed to discontinue such activities but failed to do so whereupon he was laid off" (R. 38; 27).

Petitioner's foremen occupy a position at the first level of supervision [3] and are responsible in a limited sense for the training of workers who are directly under them and for the quality and quantity of production, for safety conditions, and for other aspects of production in their respective departments (R. 36–37; 197–203). However, with respect to all these matters, standards by which the foremen are, generally speaking, bound, are set by other departments (R. 36–37; 219–236).[4]

[3] The managerial hierarchy of petitioner's plant at the time of the hearing was as follows (R. 187–188, 191):

1 General Manager	38 General Foremen
7 Superintendents	78 Foremen
8 Assistant Superintendents	5 Assistant Foremen

This was substantially the situation that existed at the time of the unfair labor practices (R. 189, 191). Foremen and assistant foremen direct the activities of the production and maintenance personnel under them and report to the general foremen (R. 188–189, 239). Although about 95 percent of petitioner's foremen are recruited from the rank and file, they are excluded from the collective bargaining contract which petitioner has entered into with the union representing the nonsupervisory production and maintenance employees (R. 202, 195, 298–299).

[4] For example, the inspection department (R. 219), the engineering department (R. 220–221), the stock department (R. 221–222), the safety engineers (R. 223), the employment department (R. 224), the standards department (R. 224, 225), the time-study men (R. 225), the personnel department (R. 226–227), the cost department, and the tool design engineering department (R. 229).

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The role of foremen in the rank and file grievance procedure is dictated by petitioner's contract with the rank and file union, which provides that settlement of a grievance is first to be attempted by the foreman, but is subject to an appeal to higher plant authority (R. 37; 192–193, 195, 300–302).

Upon these facts the Board concluded (R. 36, 37) that "the foremen at the plant were supervisory employees who occupy an intermediate position between top management and the rank and file employees * * * foremen are bound by directions from their own supervisors, but in their own departments, as supervisors, they exercise a good deal of discretion in carrying out their orders." The Board found further (R. 37) that these supervisory employees were, nonetheless, employees within the meaning of the Act and entitled to the protection of Section 8 (1) and (3) thereof. The Board held, therefore (R. 37, 43), that petitioner, through the acts and conduct of Personnel Director Erwood and Plant Manager Walton, had interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them by Section 7, thus violating Section 8 (1) of the Act. The Board also held (R. 39, 43) that Owens' Union activities played a part in his selection for layoff, and that in any event the refusal to reemploy him when he normally would have been reemployed, solely because of his Union activities, was itself a violation of Section 8 (3) of the Act. Consequently, the

Board ordered petitioner to cease and desist from its unfair labor practices, or from interfering in any other manner with its supervisory employees in their self-organizational efforts; affirmatively, the Board ordered petitioner to reinstate Owens with back pay and to post the usual notices (R. 55–56).

On May 11, 1946, the National Labor Relations Board filed in the court below a petition requesting enforcement of its order (R. 1–6). On June 3, 1947, the court below handed down its decree holding that the foremen here involved were "employees" within the meaning of the National Labor Relations Act and that the Board's findings of unfair labor practices in violation of Sections 8 (1) and (3) of the Act were supported by substantial evidence (R. 321–322). The court accordingly enforced the Board's order (R. 321–322).

ARGUMENT

1. Insofar as the decree below enforces the cease and desist provisions of the Board's order, it imposes on petitioner a rule of conduct for the future which is inconsistent with the now existing rule of law applicable to such situations. Thus the cease and desist provisions of the Board's order require petitioner not to discourage membership of its supervisory employees in the Foreman's Association of America and not in any other manner to interfere with, restrain or coerce its supervisory employees in the exercise of the

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right to self-organization (R. 55). Since August 22, 1947, the effective date of the Labor Management Relations Act, it has been lawful for an employer to discourage membership of his supervisory employees in a labor organization, and otherwise to interfere with self-organization of supervisors. By Section 2 (3) of the amended National Labor Relations Act any individual employed as a supervisor is excluded from the term employee as used in the Act, and by Section 2 (11) the term supervisor is defined in such a manner as to embrace all foremen of the type involved in the instant case. If there could be any doubt from the language changes made in the Act as to the intent of Congress, the legislative history of these changes makes it entirely clear that Congress intended that employers be free in the future to discharge foremen for joining a union and to otherwise interfere with foremen's organizational activity.[5]

Since the cease and desist provisions of the decree below enjoin petitioner from engaging in conduct which is now lawful these provisions should be stricken. *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443, 464; *American Steel Foundries* v. *Tri-City Council,* 257 U. S. 184, 208.

[5] H. Rep. No. 245, on H. R. 3020, 80th Cong., 1st Sess., p. 15; S. Rep. No. 105, on S. 1126, 80th Cong., 1st Sess., pp. 4–5; Cong. Rec., April 15, 1947, pp. 3533, 3556; Cong. Rec., April 23, 1947, p. 3952; Cong. Rec., April 28, 1947, p. 4260; Cong. Rec., May 1, 1947, p. 4490; Cong. Rec., May 12, 1947, pp. 5518, 5146; Cong. Rec., June 6, 1947, p. 6660.

The Board, therefore, consents to the grant of certiorari limited to the questions presented by these cease and desist provisions, and consents to the modification of the decree below by striking therefrom all provision for enforcing the cease and desist paragraphs of the Board's order, being paragraphs 1 (a) and 1 (b) of the Board's order (R. 55).

2. With respect to the portion of the decree below which enforces the Board's order requiring reinstatement with back pay to Owens, we believe that a different rule of law is applicable.* Owens was discharged on April 14, 1944 (R. 38). He was not only discriminatorily removed from his job as a foreman but also was discriminatorily denied the job as a non-supervisory employee which he held before he became a foreman and to which he would have been returned but for his

*On July 7, 1947, the Circuit Court of Appeals for the Sixth Circuit in *Eastern Gas and Fuel Associates* v. *N. L. R. B.*, 162 F. 2d 864, issued its decision enforcing a Board order which required the employer to reinstate a foreman discriminatorily discharged for his activities in behalf of a union of supervisory employees. On September 8, 1947, however, the court, on the employer's petition for rehearing and without benefit of the views of opposing counsel, modified its decree "so as to be limited in its terms to the period ending August 22, 1947," the effective date of the Labor Management Relations Act. The Board disagrees with the court's ruling insofar as the ruling may be deemed inconsistent with the views stated herein, but no further proceedings have been taken in that case, adjustment of the case having been made informally on terms satisfactory to all parties.

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union activities (R. 38–39; 100, 112, 127, 138–139, 309). The Board has consistently protected foremen against discharge for union activity, without regard for the diversity of opinion as to the obligation of an employer to bargain with foremen which was described in *Packard Co.* v. *N. L. R. B.*, 330 U. S. 485, 492. In engaging in union activity Owens relied upon the then well established law that an employee in his position was protected from discharge on account of organizational activity and would receive reinstatement and back pay if discharged on account of such activity.[7] The question here before the Court is whether, by having delayed making restitution for more than three years during which time the law was changed so that such a discharge in the future is not illegal, petitioner can deprive Owens of such restitution. We believe the answer

[7] See e. g. *National Labor Relations Board* v. *Fruehauf Trailer Co.*, 301 U. S. 49, enforcing 1 N. L. R. B. 68, 76; *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. 2d 862, 870–871 (C. C. A. 2), certiorari denied, 304 U. S. 576, enforcing as modified 2 N. L. R. B. 626, 678; *National Labor Relations Board* v. *American Potash & Chemical Corp.*, 98 F. 2d 488, 493. (C. C. A. 9), enforcing 4 N. L. R. B. 498, 504–505; *National Labor Relations Board* v. *Skinner & Kennedy Stationery Co.*, 113 F. 2d 667, 671 (C. C. A. 8), enforcing 13 N. L. R. B. 1186, 1192–1193; *National Labor Relations Board* v. *Richter's Bakery*, 140 F. 2d 870 (C. C. A. 5), certiorari denied, 322 U. S. 754, enforcing 46 N. L. R. B. 447, 450, 474–479; *National Labor Relations Board* v. *Condenser Corp.*, 128 F. 2d 67, 74–75 (C. C. A. 3), enforcing 22 N. L. R. B. 347, 386–389; *R. R. Donnelley & Sons Co.* v. *National Labor Relations Board*, 156 F. 2d 416, 420–421 (C. C. A. 7), certiorari denied, 329 U. S. 810.

should be in the negative, especially in a situation such as this where the right to restitution had already been embodied in a decree prior to the change in the law.

As has been noted, the decree of the court below was issued on June 3, 1947 (R. 321), twenty days before the enactment of the amendatory Act and eighty days prior to its effective date. No question is here raised as to the validity of the decree as of the time it was issued and for eighty days thereafter, or as to the illegality of petitioner's conduct during the three years preceding. Had petitioner, therefore, complied, as it should have, at any time during the almost three months prior to the effective date of amendatory Act with the then admittedly valid decree (as to which no stay was granted), nothing of any significance would have remained to be decided. Petitioner, however, persisted in its refusal to comply until the passage of the amendment in question and thereafter until its effective date, and now seeks to utilize its failure to comply with that decree as a basis for non-compliance thereafter. Petitioner should not be permitted to benefit by reason of its long continued refusal to obey the law. Cf. *United States ex rel. Randall* v. *U. S. Marshal for Eastern District of New York,* 143 F. 2d 830 (C. C. A. 2), where petitioner fled the jurisdiction of the court after having been sentenced for violation of the Prohibition Act. Many years after the repeal of that Act, petitioner was recap-

tured and filed a petition for a writ of habeas corpus. In denying the petition the court said: "If he had surrendered on February 2, 1932, instead of fleeing the jurisdiction, service of his sentence would have been completed before the repeal of the Eighteenth Amendment. In the circumstances he has no just ground for complaining because the United States Marshal is now proceeding to have the sentence executed." To the same effect see other cases cited n. 13, p. 17, *infra*.

Moreover, entirely apart from the fact that petitioner's obligation to make Owens whole by reinstating him with back pay had been embodied in a valid decree prior to the change in the law, we believe that under applicable statutes and decisions of this Court, petitioner's liability to reinstate Owens with back pay became fixed at the time it unlawfully discharged him and is not affected by the change in the law. Petitioner's position to the contrary is based on the now superseded common law rule which was that, absent a savings clause, the repeal of a federal statute destroys the rights and obligations, and remits the penalties and forfeitures dependent upon that statute. *Hertz* v. *Woodman*, 218 U. S. 205, 216; *United States* v. *Tynen*, 11 Wall. 88; *Norris* v. *Crocker*, 13 How. 429. However, that rule was changed by the enactment in 1871 by the Congress of a general savings statute (Act of February 25, 1871, 16 Stat. 431, Sec. 4, 1 U. S. C. 29) which reads as follows:

> The repeal of any statute shall not have the effect to release or extinguish any pen-

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> alty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. (R. S., Sec. 13.)[8]

This Court has held that this statute is to be construed as constituting a part of every repealing act,[9] and that this is so even where the repealing statute itself contains a special savings clause.[10]

The general savings statute has been applied by this Court, by the lower federal courts, and by state courts in more than fifty cases. The words "penalty, forfeiture, or liability" have been construed to cover every cause of action, civil, criminal, or statutory. The leading case on the construction of these words is *United States* v. *Reisinger,* 128 U. S. 398, where "liability" was held to include even the "liability to be im-

[8] This statute was amended in 1944 (Act of March 22, 1944, 58 Stat. 118, c. 123) by adding the following: "The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

[9] *Great Northern Ry. Co.* v. *United States*, 208 U. S. 452, 465; *United States* v. *Chicago, St. P., M. & O. Ry. Co.*, 151 Fed. 84, 94 (D. Minn.), affirmed, 162 Fed. 835 (C. C. A. 8), certiorari denied, 212 U. S. 579.

[10] *Great Northern Ry. Co.* v. *United States*, *supra*, at p. 466; see also *Hertz* v. *Woodman*, 218 U. S. 205, 218.

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prisoned" (at p. 403). A partial list of cases collated in the footnote shows how broadly the language of the statute has been construed.[11]

Since the enactment of this statute in 1871 no federal court, so far as we have been able to determine, has ever expressly or impliedly at-

[11] *Hertz* v. *Woodman*, 218 U. S. 205 ("liability to pay" inheritance tax where testator died on March 15, 1902, repeal April 12, 1902, and date for scheduling by executor, etc., all subsequent to repeal); *United States* v. *U. S. Industrial Alcohol Co.*, 8 F. Supp. 179, 181–183 (D. Md.) (so-called tax on alcohol diverted to beverage purposes could be collected though suit not begun till after repeal of 18th Amendment); *United States* v. *Four Cases of Lastings*, Fed. Cas. No. 15, 145 (S. D. N. Y., 1879) ("liability" to forfeiture of imported goods knowingly entered by means of a false invoice); *Tinker* v. *Van Dyke*, Fed. Cas. No. 14, 058 (C. C. E. D. Mich. 1876) (the "liability" of a creditor who had received property from his debtor, under circumstances constituting an unlawful preference within the Bankruptcy Act, to refund it to the assignee of the debts in bankruptcy); *Warren* v. *Garber*, Fed. Cas. No. 17,196 (C. C. E. D. Va., 1877) (same); *Bradbury* v. *Galloway*, Fed. Cas. No. 1,764 (D. Cal.) (same); *DeFour* v. *United States*, 260 Fed. 596, 599 (C. C. A. 9), certiorari denied, 253 U. S. 487 (offense of keeping house of ill fame on June 3, 1918 in violation of Act of May 18, 1917 and the order of the Secretary of War made and issued thereunder on January 17, 1918 when law and orders made thereunder were repealed July 9, 1918); *Goublin* v. *United States*, 261 Fed. 5 (C. C. A. 9) (same); *Lang* v. *United States*, 133 Fed. 201 (C. C. A. 7) (importing women into United States for immoral purposes); *United States* v. *Krupnick*, 51 F. Supp. 982, 989 (D. N. J.) (indictments charging violation of Maximum Price Regulation under OPA); *United States* v. *Auerbach*, 68 F. Supp. 776, 778–779 (S. D. Calif.) (same); *Peters* v. *Felber*, 66 Calif. App. 2d 1011, 1012–1013, 152 P. 2d 42 (suit by tenant to recover treble overcharge of rent under O. P. A. after section in question completely revised by Congress).

tempted, in any case involving the repeal or amendment of a federal statute, to apply the common law rule of repeal by implication, or of remission of liability or offense by repeal. An examination of the many cases cited by petitioner (Pet. 27–41) reveals that none of them conflict with this basic principle.[12] *United States* v.

[12] Although many of the cases cited by petitioner are distinguishable on several grounds, for purposes of brevity only one ground will be cited here. Cases decided prior to 1871 and therefore not applicable: *The Assessor* v. *Osbornes*, 9 Wall. 567 (1869); *Ex Parte McCardle*, 7 Wall. 506 (1868); *Insurance Company* v. *Ritchie*, 5 Wall. 541 (1866); *McNutty* v. *Batty*, 10 How. 72 (1850; *Harvey* v. *Tyler*, 2 Wall. 328 (1864); *Norris* v. *Crocker*, 13 How. 429 (1851); *United States* v. *The Schooner Peggy*, 1 Cranch 103 (1801); *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. 421 (1855). Jurisdictional cases where the amendatory or repealing statute expressly removed all jurisdiction in the courts to hear or process or specifically applied to pending proceedings; *Carpenter* v. *Wabash Ry. Co.*, 309 U. S. 23; *In re Hall, Petitioner*, 167 U. S. 38; *Railroad Co.* v. *Grant*, 98 U. S. 398; *Smallwood* v. *Gallardo*, 275 U. S. 56. Cases where either no amendatory statute or no federal statute was involved: *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 331 U. S. 416; *Gulf, C. & S. F. Ry. Co.* v. *Dennis*, 224 U. S. 503, 506; *Patterson* v. *Alabama*, 294 U. S. 600; *Ashcraft* v. *Tennessee*, 322 U. S. 143; *Vandenbark* v. *Owens-Illinois Co.*, 311 U. S. 538; *Watts, Watts & Co.* v. *Unione Austriaca Di Navigazione*, 248 U. S. 9; *Lamb* v. *Powder River Live Stock Co.*, 132 Fed. 434 (C. C. A. 8). Cases where relief granted was against orders stating rules to govern a continuing course of conduct in the future: *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443; *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184; *Texas Company* v. *Brown*, 258 U. S. 466; *Ziffrin* v. *United States*, 318 U. S. 73, 78; *Public Utilities Commission of Ohio* v. *United Fuel Gas Co.*, 317 U. S. 456, 466. Mootness cases: *Mills* v. *Green*, 159 U. S. 651

Chambers, 291 U. S. 217, involved the repeal of the 18th Amendment and turned on the difference between a constitutional amendment, to which the savings statute could not apply, and an amendment to a statute.[13]

There is no merit in petitioner's contention (Pet. 32–33) that the action of Congress is specifically preserving for a year the effect of representation certifications under the old act (see Sec. 103 of the Labor Management Relations Act) implies an intention not to preserve any others. As we have stated, this Court has held that the presence of a special savings clause in an enactment does not necessarily affect the applicability of the general savings statute to the remainder of that enactment (*supra*, p. 14, n. 10). The history of the Labor Management Relations Act shows that Congress considered but rejected a proposal which

(no amendatory statute involved); *Berry* v. *Davis*, 242 U. S. 468 (no federal statute involved); *Dinsmore* v. *Southern Express Co.*, 183 U. S. 115 (order *in futuro*); *Hodges* v. *Snyder*, 261 U. S. 600 (order *in futuro*).

[13] Even here it may be noted that the courts refused habeas corpus to prisoners whose sentences had become final prior to repeal. See the *Randall* case (*supra*, pp. 12–13) decided in 1944. To the same effect see *United States ex rel. Cheramie* v. *Dutton*, 74 F. 2d 740 (C. C. A. 5), certiorari denied, 295 U. S. 733 (sentence became final month before effective date of repeal); *Welch* v. *Hudspeth*, 132 F. 2d 434 (C. C. A. 10); *United States ex rel. Nerbonne* v. *Hill*, 70 F. 2d 1006 (C. C. A. 3), certiorari denied, 292 U. S. 634; *Odekirk* v. *Ryan*, 85 F. 2d 313 (C. C. A. 6); *United States ex rel. Voorhees* v. *Hill*, 72 F. 2d 826 (C. C. A. 3); *Hosier* v. *Aderhold*, 71 F. 2d 422 (C. C. A. 5).

would have substituted the common law rule for the rule of statutory construction created by the general savings statute. Thus, a provision of Section 102 (c) of the bill passed by the House, which would have had the effect of prohibiting entry by the Board or enforcement by the courts of any order based on prior unfair labor practices unless the conduct involved continued to be an unfair labor practice under the Amendments, was eliminated in conference (see Section 102 (c) of H. R. 3020, 80th Cong., 1st Sess.; Conference Report, H. Rep. No. 510, 80th Cong., 1st Sess., p. 61).

In view of the foregoing, the Board has held that the general savings statute must be deemed to preserve all "liabilities" arising under the National Labor Relations Act prior to its amendment and that for such purposes the original Act must "be treated as still remaining in force," regardless of whether the Amendments to the Act prevent such liabilities from arising in the future."[14]

3. Petitioner's further contention, that enforcement of the Board's order would be a useless formality and frustrative of the Act, is also without merit insofar as the contention applies to the reinstatement and back pay provisions (Pet. 37–47). Petitioner asserts that the purposes sought to be achieved by the Act are remedial and not penal; that the rights sought to be guaranteed

[14] *Matter of Marshall & Bruce Co.*, 75 N. L. R. B., No. 13, 21 L. R. R. M. 1001; *Matter of Pioneer Electric Co.*, 75 N. L. R. B., No. 14, 21 L. R. R. M. 1006.

are public and not private; and that since the new act is not designed to afford protection to supervisory employees the relief in this case is inappropriate (*ibid.*). Petitioner, however, fails to distinguish between relief operating prospectively and the award of reinstatement and back pay which operates retrospectively. Cf., *National Labor Relations Board* v. *Sandy Hill Iron & Brass Works,* decided November 5, 1947 (C. C. A. 2). The Circuit Court of Appeals for the Eighth Circuit has held that "The order of this Court, affirming and directing payment of the back pay award, stamped it with finality as a definite and enforcible obligation against the employer." *National Labor Relations Board* v. *Killoren,* 122 F. 2d 609, 612. It has further been recognized that an award of reinstatement and back pay operates retrospectively with respect to past employer conduct and is intended to remedy past violations of law. *Virginia Electric & Power Co.* v. *National Labor Relations Board,* 319 U. S. 533, 539–544; *Agwilines, Inc.* v. *National Labor Relations Board,* 87 F. 2d 146, 150 (C. C. A. 5). It follows that since such an award is retrospective, and does not undertake to govern the employer's future conduct vis-a-vis his employees, a final decree embodying such an award, entered prior to August 22, 1947, remains enforceable.[18] Certainly

[18] The cases cited by petitioner (Pet. 38–41) to establish that enforcement of the Board's order herein would be a futile gesture all present instances where the remedy sought

a judgment awarding back pay would not be futile or a formality. And an order of reinstatement would place Owens in the same position he would have occupied if petitioner had obeyed the law in effect when he discharged Owens and the decree of the court below when it was entered.

4. The issue in this case is of no general importance inasmuch as it applies only to a situation in which a judicial decree ordering reinstatement of foremen with back pay was entered but not obeyed prior to the passage of the 1947 Act. Although a few other cases decided by or presently pending before the Board may raise a related question, the instant case is the only one now pending in which the judicial decree was entered before the enactment of the 1947 Act.

CONCLUSION

The National Labor Relations Board consents to the granting of a writ of certiorari for the purpose of striking from the decree of the court below the cease and desist provisions thereof.

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to be applied was impossible of fulfillment or prospective in nature and contrary to the then existing law. In *Pennsylvania* v. *The Wheeling & Belmont Bridge Co.*, 18 How. 421, although the injunction against the construction and maintenance of a bridge was dissolved in view of an intervening act of Congress specifically authorizing the bridge at its then site and elevation, that part of the decree awarding costs to the petitioner was held to have passed "beyond the reach of the power of congress" and was sustained (at pp. 431–432).

Subject to these modifications, it is submitted that the decision below is correct in all respects. No question of general importance is raised. The petition as to the remaining question presented should, therefore, be denied.

Respectfully submitted,

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DECEMBER 1947.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C., 151 *et. seq.*) are as follows:

SEC. 2. When used in this Act—

* * * * *

3. The term "employee" shall include any employee, * * *.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. * * *

* * * * *

SEC. 10. (e) The Board shall have power to petition any circuit court of appeals

of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court

as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like man-

ner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

2. The relevant provisions of the Labor Management Relations Act of 1947 (Public Law 101, 80th Cong., 1st Sess., Chap. 120) are as follows:

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

* * * * *

"SEC. 2. When used in this Act—

* * * * *

"(3) The term 'employee' shall include any employee, * * * but shall not include any individual employed * * * as a supervisor, * * *.

* * * * *

"(11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

* * * * *

"SEC. 10. * * * (e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as pro-

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vided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * * *

"SEC. 14. (a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

* * * * *

SEC. 103. No provisions of this title shall affect any certification of representatives or any determination as to the appropriate collective-bargaining unit, which was made under section 9 of the National Labor Relations Act prior to the effective date of this title until one year after the date of such certification or if, in respect of any such certification, a collective-bargaining contract was entered into prior to the effective date of this title, until the end of the contract period or until one year after such date, whichever first occurs.

SEC. 104. The amendments made by this title shall take effect sixty days after the date of the enactment of this Act, except that the authority of the President to appoint certain officers conferred upon him by section 3 of the National Labor Relations Act as amended by this title may be exercised forthwith.

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